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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PENDLETON DIVISION**

**GREATER HELLS CANYON
COUNCIL, et al.,**

Plaintiffs,

v.

HOMER WILKES, et al.,

Defendants,

and

**AMERICAN FOREST RESOURCE
COUNCIL and EASTERN OREGON
COUNTIES ASSOCIATION,**

Defendant-Intervenors.

Case No. 2:22-CV-00859-HL

**NEZ PERCE TRIBE'S MOTION FOR
LEAVE TO PARTICIPATE AS *AMICUS
CURIAE***

The Nez Perce Tribe (“Tribe”) respectfully moves this Court for leave to participate as *amicus curiae* and file a brief in this case. The Tribe’s brief will support Plaintiffs’ Motion for Summary Judgment with respect to Count One of the Second Claim For Relief in Plaintiffs’ First Amended

Complaint (Failure to Hold an Administrative Objection Process as Required by 36 C.F.R. § 219, Subpart B) (Dkt. No. 12). The Tribe also respectfully seeks this Court’s leave to file its brief on or before Friday, January 20, 2023. This proposed timeframe shall allow Federal Defendants and Defendant-Intervenors adequate time to respond to the Tribe’s brief (Federal Defendants’ and Defendant-Intervenors’ Responses are due February 3, 2023, and February 10, 2023, respectively). Pursuant to LR 7-1, the Tribe has contacted counsel for Federal Defendants and Defendant-Intervenors regarding this Motion. Federal Defendants do not oppose the Tribe’s Motion or proposed briefing schedule. Defendant-Intervenors take no position.

I. Introduction

In January 2021, the Forest Service, Pacific Northwest Region, issued a Decision Notice and Finding of No Significant Impact for Forest Plans Amendment: Forest Management Direction for Large Diameter Trees in Eastern Oregon and Southeastern Washington (“Project”). James Hubbard, former Under Secretary for Natural Resources and Environment, United States Department of Agriculture, signed the Project on January 15, 2021, which included a statement claiming that the Project is not subject to administrative objection under 36 C.F.R. § 219.51(b). The Tribe is a sovereign with treaty-reserved rights and resources in the Project area, participated as a Cooperating Agency on the Project, and participated extensively with the Forest Service in the Project review. The Tribe is concerned with the Forest Service’s interpretation of 36 C.F.R. § 219.51(b) as applied to former Under Secretary Hubbard’s January 15, 2021, action. The Tribe is also concerned with the precedential implications of the Forest Service’s interpretation on the government-to-government relationship between the Tribe and Forest Service. The Tribe, therefore, respectfully seeks the Court’s leave to participate as *amicus curiae* and file a brief in this case.

II. Statement of Interest

The Tribe is a federally-recognized Indian tribe with headquarters in Lapwai, Idaho. Since time immemorial, the Tribe has occupied and used over 13 million acres of lands now comprising north-central Idaho, southeast Washington, northeast Oregon, and parts of western Montana. For millennia, Tribal members have engaged in fishing, hunting, and gathering across their vast aboriginal territory.

In 1855, the United States entered into a treaty with the Tribe.¹ In this treaty, the Tribe explicitly reserved, and the United States secured, a permanent homeland and on- and off-reservation rights including:

...the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Id. These treaty-reserved rights, and their associated activities, continue to play a major role in Tribal members' culture, religion, subsistence, and commerce.

The Project amends the land management plans for the Deschutes, Fremont-Winema, Malheur, Ochoco, Umatilla, and Wallowa-Whitman National Forests in Oregon and southeast Washington. The Umatilla and Wallowa-Whitman National Forests are located within the Tribe's aboriginal territory and subject to the Tribe's treaty-reserved rights and other rights that are foundational to the Tribe's existence. The Forest Service accepted the Tribe's invitation to be a Cooperating Agency² for the proposed Project, and the Tribe participated in regular, interdisciplinary team meetings with Regional and Forest-level Forest Service personnel concerning the Project. The Tribe submitted comments on the Project's draft Environmental Assessment on October 13, 2020,

¹ Treaty with the Nez Perces, June 11, 1855, 12 Stat. 957.

² See 40 C.F.R. § 1508.5.

and engaged in government-to-government consultation with the Forest Service regarding the proposed Forest Plans Amendment on December 22, 2020.

III. Argument in Support of Motion for Leave to Participate as *Amicus Curiae*

Authorization to appear and participate as *amicus curiae* is within the broad discretion of this Court.³ The Forest Service's interpretation of 36 C.F.R. § 219.51(b) as applied to former Under Secretary Hubbard's January 15, 2021, action does not align with the Forest Service's repeated representations to the Tribe throughout the review process and in government-to-government consultation as to the Project decision maker, delegation of Project decision authority, and availability of an administrative objection process. The Forest Service's interpretation of 36 C.F.R. § 219.51(b) also raises precedential concerns related to the agency's government-to-government relationship with the Tribe concerning the review of future projects affecting the Tribe's treaty rights and resources. The Tribe is committed to ensuring Forest Service decision making—especially decisions that may affect the Tribe's treaty-reserved rights and resources—is accurate, informed, consistent, transparent and adheres to other bedrock principles foundational to the government-to-government relationship between tribes and the United States. The Tribe, therefore, respectfully requests participation as *amicus curiae* to file a brief in this litigation.

Dated: December 23, 2022.

Respectfully submitted,

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³ See *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982).

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